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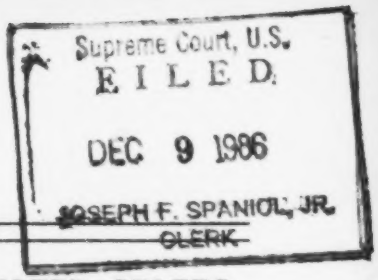

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RUTH THOMAS, Petitioner

vs.

JOE D. RHODES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

ROBERT E. HOBLIT
Counsel of Record

P. O. Drawer 4109
Odessa, Texas 79760
Phone: 915-337-3535

Lester C. Boone
Will Hadden of
Hadden & Hadden,
Attorneys, P.C.
414 N. Lee Street
Odessa, Texas 79761
Phone: 915-332-0555

Counsel for Petitioner

FEDERAL QUESTIONS PRESENTED

I. Whether, under the appropriate provisions of Title 28 United States Code, the summary administrative sale by the Internal Revenue Service of a commercial piece of community property in Texas for the collection of withholding and social security taxes, and the quitclaim deed by the District Director of Internal Revenue Service to the highest bidder pursuant to such sale, sold and conveyed the 100% interest in the community property or only sold and conveyed the delinquent taxpayer husband's undivided one-half community interest therein.

II. Whether the failure to redeem such commercial piece of community property pursuant to 26 United States Code §6337 precluded the wife from recovering her undivided one-half of the community property in a State Court trespass to try title action against the purchaser at such sale.

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NO

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH THOMAS, Petitioner

vs.

JOE D. RHODES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

OPINIONS BELOW

The Opinion of the Court of Appeals, 2nd Supreme Judicial District of Texas, dated Jan. 22, 1986, is reported as Thomas v. Rhodes, 701 SW2d 943 (Tex App 2 Dist 1986). A copy is shown in Appendix A.

Petitioner's Application For Writ of Error to the Texas Supreme Court requesting such Court to review the judgment of the Court of Appeals, was refused by the Texas Supreme Court on June 11, 1986,

with the notation "no reversible error." There was no opinion written by the Supreme Court on such refusal. By letter dated June 11, 1986, Petitioner was notified of such refusal. A copy of such letter is shown in Appendix B. Petitioner's Motion For Rehearing of her Application For Writ of Error, was overruled by the Texas Supreme Court without opinion on September 10, 1986. A copy of the letter so stating is shown in Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C.A. §1257 (3).

FEDERAL STATUTORY PROVISIONS INVOLVED

26 United States Code § 3401(d):

> (d) . . . For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such persons . . .

26 United States Code §3403:

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter . . .

26 United States Code §6303(a):

. . . The Secretary or his del gate, shall . . . give notice to each person liable for the unpaid tax . .

26 United States Code §6321:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 United States Code §6331:

(a) . . . If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . .

(b) . . . in any case in which the Secretary or his delegate may levy upon property or rights to property,

he may seize and sell such property or rights to property. . .

26 United States Code §6335:

(b) . . . The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner . . . Such notice shall specify the property to be sold, and the time, place, manner and conditions of the sale thereof. .

26 United States Code §6337:

(b) . . . the owners of any real property sold as provided in section 6335, . . . or any person having any interest therein . . . or any person in their behalf, shall be permitted to redeem the property sold . . . at any time within 120 days after the sale therof.

26 United States Code §6338(b):

. . . In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary or his delegate shall execute . . . to the purchaser of such real property at such sale a deed of the real property so purchased by him . . .

26 United States Code §6339(b)(2):

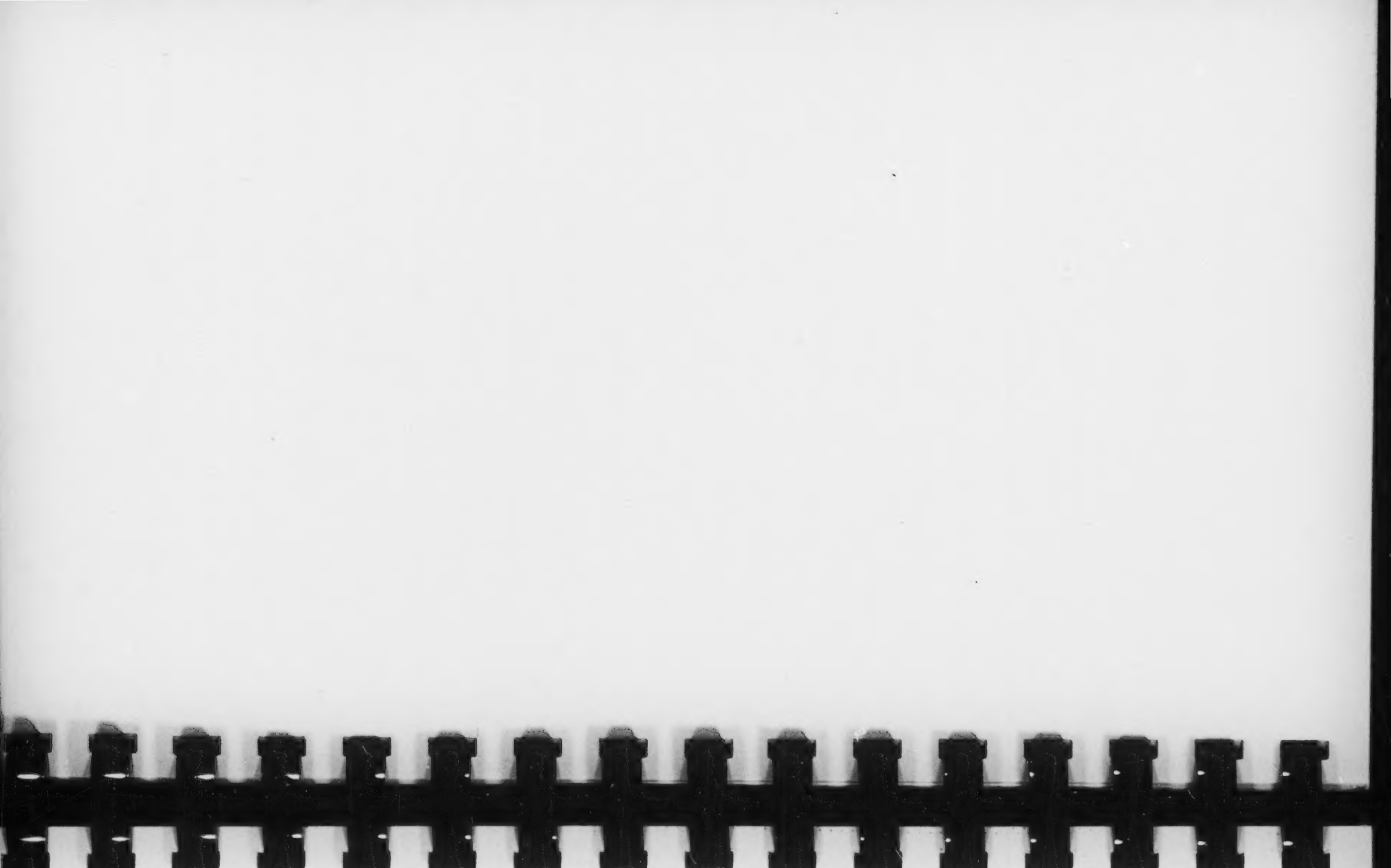
. . . In the case of the sale of real property pursuant to section 6335 . .

> . . such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

STATEMENT OF THE CASE

Petitioner's husband, Roy G. Thomas, became delinquent in the payment of Federal withholding and social security taxes in his dry cleaning business, Zip Cleaners, in Fort Worth, Texas. The IRS levied on a piece of commercial property in Fort Worth, Texas (the James Street Property), which was the community property of Petitioner and Roy G. Thomas. Notice of Public Auction was given by the IRS to the husband only, which Notice provided that "only the right, title and interest of Roy Thomas, Zip Cleaners, in and to the property will be offered for sale." At the sale, Respondent was high bidder. There was no redemption of the property under 26 United States Code

§6337. After 120 days, the District Director of Internal Revenue, Dallas, Texas, executed and delivered to Respondent a quitclaim deed which conveyed to him "all the right, title and interest of the said Roy Thomas, dba Zip Cleaners" in and to the property. Petitioner filed a trespass to try title suit against Respondent in the State District Court in Ft. Worth, Texas, claiming title to an undivided one-half interest in the James Street Property on the grounds that the IRS sale and conveyance did not sell and convey her undivided one-half community interest to Respondent. Respondent claimed that the IRS sold him 100% of the property. He also claimed that the failure to redeem the property under 26 United States Code §6337 estopped Petitioner from bringing her action, and he further claimed that he had acquired her undivided one-half of the community property under the Texas 5 year



statute of limitations. Trial was before the Court, who entered a take nothing Judgment against Petitioner and in favor of Respondent. The Trial Court held that the IRS quitclaim deed conveyed to Respondent 100% of the property, including Petitioner's undivided one-half community interest, that she was estopped from bringing the action for failing to redeem, and estopped to bring the action based on the 5 year statute of limitations. The Court of Appeals, 2nd Supreme Judicial District of Texas, sitting in Fort Worth, Texas, affirmed the Trial Court (opinion not yet reported). The Texas Supreme Court refused Petitioner's application for Writ of Error without opinion, and denied her Motion for Rehearing without opinion. This Petition for Writ of Certiorari is to the Court of Appeals.

Federal question #I was raised in the Texas Trial Court by Petitioner as shown

by the Statement of Facts, the Transcript, and Supplemental Transcript. The IRS Notice of Public Auction and the IRS quitclaim deed was introduced in evidence (Exhibits 7 & 8, page 45, SF). In Petitioner's Suggested Findings of Fact and Conclusions of Law (pages 31 - 38, Tr), and again in Plaintiff's Requested Findings of Fact and Conclusions of Law (in the Supplemental Transcript), federal question #I claims were brought to the Court's attention. The Trial Court refused to make the Suggested and Requested Findings of Fact and Conclusions of Law on federal question #1 claims. Respondent raised federal question #II in his Original Answer in the Trial Court (pp 6 - 8, Tr). The Trial Court overruled Petitioner's federal question #1 claims by entering the take nothing Judgment against her (p. 28, Tr), but held in favor of Respondent on his federal question #II defense. In her

Brief in the Texas Court of Appeals Petitioner assigned as error both federal questions, Points of Error 1 through 8, 21 through 24, and 39 through 40. Petitioner re-urged both federal questions in her Motion For Rehearing in the Texas Court of Appeals, in her Application to the Texas Supreme Court, and in her Motion For Rehearing in the Texas Supreme Court. The Texas Court of Appeals overruled Petitioner's federal claims and affirmed Respondent federal defense, by affirming the Trial Court's Judgment. The Texas Supreme Court noted "no reversible error" on its refusal of Petitioner's Application For Writ of Error. This notation means the Texas Supreme Court is not satisfied that the opinion of the Court of Appeals in all respects has correctly declared the law, but is of the opinion that the application presented no error which requires reversal. Rule 483, Texas Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT AS TO FEDERAL QUESTION #I

As to Petitioner's federal question #I claims, the Court of Appeals has decided important aspects thereof against Petitioner which have not been, but should be, settled by the United States Supreme Court. The Court of Appeals has decided other important aspects of Petitioner's federal question #I claims against her in a way in conflict with applicable decisions of the United States Supreme Court. The Federal law that applies to Petitioner's federal question #I claims is as follows, to-wit:

a. The IRS used a Federal administrative summary procedure in foreclosing its Federal Tax Lien. 26 USC §§ 6331, 6335, 6338(b), 6339(b) and 6342; Mansfield v. Excelsior Refinery Co., 135 US 326, 10 SCt 825, 34 LEd 162 (1890).

b. Federal law determines who is liable for the federal tax, i. e. who

is the delinquent taxpayer, and in this respect determines whether such liability is an individual liability or a joint liability with some other person. 26 USC § 3403; United States v. Rodgers, 461 US 677, 76 LEd 2d 236, 103 SCt 2131.

c. Federal law determines that a tax lien is against whatever property, and rights to property, that belong to the person liable for the payment of the tax. 26 USC § 6321.

d. Federal law looks to Texas law for the definition of property or rights to property, but the determination of such definition is a Federal question. Aquilino v. United States, 363 US 509, 513-515, 80 SCt 1277, 1280-1281, 4 LEd 2d 1365 (1960).

e. Federal law limits the scope of the lien to the property, and rights to property, that belong to the person liable for the payment of the tax. 26 USC §6321; Adler v. Nicholas, 166 F2d 674, 678 Hn 1-2

(CA10 1948); Maule Indus., Inc. v. Tomlinson, 244 F2d 897 (CA5 1957).

f. Under Federal Law, only the right, title and interest of the delinquent taxpayer is conveyed by the IRS quit-claim deed. 26 US 6339(b)(2); Mansfield v. Excelsior Refinery Co., 135 US 326, 10 SCt 825, 34 LEd 162 (1890).

g. Under Federal law, the fact that, under Texas law, Roy G. Thomas may have had the sole right to manage, control and dispose of the James Street property, is immaterial. Warburton v. White, 176 US 484, 20 SCt 404, 44 LEd 555 (1900).

h. Under Federal law, the fact that, under Texas law, the tax liability of Roy G. Thomas is a community obligation, is immaterial. United States v. Rodgers, supra.

The proper conclusion from the proper application of the above Federal law to this case, is that the IRS sale and con-

veyance did not convey Petitioner's undivided one-half community interest in the James Street Property to Respondent.

The proper application of Federal law applicable to Petitioner's federal question #I claims is as follows:

Federal Tax Liens, Levies, Sales and Conveyances Are Governed by Federal Law

Liens for federal taxes, and the manner of their enforcement are matters governed by federal law, not State law. United States v. American National Bank of Jacksonville, 255 F2d 504, at 506 Hn 1 (CA5 1958, certiorari denied, 358 US 835, 79 SCt 58, 3 LEd 2d 72, rehearing denied 359 US 1006, 79 SCt 1135, 3 LEd 2d 1034). United States' federal tax collection rights derive from, and are limited by, federal statutes which create them. United States v. Lester, 235 F.Supp. 115, 119 Hn 1,2,3 (DC Ny 1964).

When a taxpayer fails to pay federal taxes to the IRS, after demand and failure

to pay, the United States acquires a federal tax lien upon only the property and rights to property belonging to the person liable for the payment of the taxes, to secure the payment of the amount due. 26 U.S.C § 6321. United States v. Overman, 424 F2d 1142, 1144 hn 1 (CA9 1970). Tillery v. Parks, 630 F2d 775 (CA10 1980). Herndon v. United States, 501 F2d 1219, 1223 (CA8 1974).

A federal tax lien extends only to the property of a person, and on conditions, as provided for by federal statute and regulations, and then only where there has been substantial compliance with all federal statutory and regulatory requirements. F. P. Baugh, Inc. v. Little Lake Lumber Co., 297 F2d 692, certiorari denied 370 US 909, 82 SCt 1256, 3 LEd 2d 404.

Definition of Rights To Property left to State Law

Federal law says that the definition

of property and rights to property is left to the State in which the property is located. United States v. Rodgers, 461 U.S. 677, 76 LEd 2d 236, 103 SCt 2132, 2137 (1983). United States v. Bess, 357 U.S. 51, 56-57, 78 SCt 1054, 1057-1058, 2 Led 2d 1135 (1958). Hollingshead v. United States, U.S. Dist Ct. N.D Tex, Abilene Div. No. AC1-85-54-K, 7/1/85., CCH 85-2 USTC §9772, page 90177.

However, the Federal Courts ultimately determine what that definition is. Aquilino v. United States, 363 US 509, 513-515, 80 S Ct 1277, 1280-1281, 4 LEd 2d 1365 (1960).

Under Texas Law, The James Street Property Was Community Property

The Trial Court found the James Street Property was community property (Tr p 39, FF #2). Under Texas law each spouse has a property right in community property. Such property right is a

present vested interest, equal and equivalent in all respects. Hopkins v. Bacon, 282 U.S. 122, 126-127, 51 SCt 62, 75 LEd 249 (1930). Leyva v. Rodriguez, 195 SW2d 704, 707 Hn 1-3 (Tex Civ App 1946, ref nre). 39 Tex Jur 3d, § 458, p 657, notes 25 - 30. Commissioner v. Chase Manhattan Bank, 259 F2d 231, 238-239 (CA5 1958), cert den 359 US 913, 79 SCt 589, 3 LEd 2d 575.

Deed in Husband's Name Only Does Not Alter Community Property Ownership

The fact that the Deed to the James Street Property was in the name of Roy G. Thomas only [Pl Ex #4 p 41 SF] does not change the Texas law that each spouse has a vested ownership of one-half of the community real property. Carter v. Barnes, 16 SW2d 136, 139 (Tex Civ App 1929), reversed on other grounds, 25 SW2d 606 (Tex Comm App 1930). Gilmore v. O'Neil, 173 SW 203 (Tex Sup Ct 1915); 56 Tex Jur 2d, § 10, p 77-78. Burnham v. Hardo Oil Co,

195 SW 1139 (Tex Sup Ct 1917); 39 Tex Jur 3d, § 458, p 658, note 29. Even though the Deed was solely in the name of Roy G. Thomas, the IRS quitclaim deed did not convey Petitioner's equitable interest in the James Street property. See State by Commissioner of Transportation v. Shuman, 374 A2d 500 (New Jersey, 1977), where a New Jersey Court held that an IRS summary administrative levy and sale of the property solely in the name of the husband, did not cut off the dower rights of the wife.

An equitable title is sufficient to support a suit for Trespass To Try Title. Gilmore v. O'Neil, 173 SW 203 (Tex Sup Ct 1915). 56 Tex Jur 2d, § 10, p 77-78.

§ 5.22 and § 5.61 Do Not Alter Community Property Ownership

In Texas, the question of who had the right to manage, control and dispose of the James Street property [e.g. § 5.22, Texas Family Code], was immaterial in

determining whether and to what extent Roy G. Thomas had property rights in the James Street property. Warburton v. White, 176 US 484, 20 SCt 404, 44 LEd 555 (1900). Mercury Fire Ins. Co. v. Dunaway, 74 SW 2d 418, (Tex Civ App 1934). The Warburton case is quoted in Arnold v. Leonard, 273 SW 799, at 804 (Tex Sup Ct 1925). The Warburton case involved Washington State community property. The United States Supreme Court held that the husband's sole right to manage the community property did not give the purchaser at a sheriff's sale 100% ownership, in a suit to quiet title between the purchaser at the sheriff's sale and heirs of the deceased wife.

Equal ownership inheres in the Texas community property system, while control is a collateral and statutorily defined issue. W. De Funiak & M. Vaughan, Principles of Community Property, (2d Ed 1971), § 1 at 2, § 90 at 118.

In Texas, community property means equal ownership regardless of control. Leyva v. Rodriguez, 195 SW2d 704, 707 Hn 1-3 (Tex Civ App 1946, ref nre). Hollingshead v. United States, U.S. Dist Ct. N.D.Tex, Abilene Div. No. AC1-85-54-K, 7/1/85, CCH 85-2 USTC §9772, pages 90,117 and 90,119.

Under the early system of community property, the rights to convey, encumber, transfer, and litigate, were merely incidents of the duty to manage the community, and marked no difference in the ownership of the spouse vested with these rights. §5.22 did not change this concept. W. De Funiak & M. Vaughan, Principles of Community Property, (2d Ed 1971) at § 124.

In Texas, the marital property rules as to what marital property is liable for which spouse's liabilities under § 5.61 was immaterial in determining whether and to what extent Roy G. Thomas had property

rights in the James Street property. United States v. Rodgers, 461 US 677, 76 LEd 2d 236, 103 SCt 2132 (1983). Hollingshead v. United States, U.S. Dist Ct. N.D.Tex, Abilene Div. No. AC1-85-54-K, 7/1/85, CCH 85-2 USTC §9772, page 90,118. The Ninth Circuit of the United States Court of Appeals in Babb v Schmidt, 496 F2d 957 (CA9 1974), has held that California law is to the contrary. It is implicit in Rodgers, supra and Hollingshead, supra, that Texas does not follow the California law. Applying Texas law, the United States District Court, Eastern District of Texas, in Short v. United States, 395 F. Supp. 1151 (ED Tex 1975), held that promissory note payments to the non-delinquent wife, which was her special community, owed by a third party to her, were subject to the federal tax lien to pay the delinquent husbands' individual tax debt for employment taxes. However,

it is implicit in U. S. Supreme Court's opinion in Rodgers, supra, that the Short case is wrong, and that only the husband's one-half of such payments were subject to the federal tax lien.

The Legislature has no authority to enact law that will change the status of property, other than as defined by Texas Constitution, Art 16, § 15. Arnold v. Leonard, 273 SW 799 (Tex Sup Ct 1925). Neither the "right to control" statute, nor the "who is liable for whose debts" statute (§ 5.22 and § 5.61), nor any other Texas statutes or law, gave to Roy G. Thomas any additional property, or rights to property, in the James Street property nor took away any part of Petitioner's undivided one-half thereof. W. De Funiak & M. Vaughan, Principles of Community Property, (2d Ed 1971) §115 at 283.

Federal Law Determines the Consequences That Attach to The Property and Rights to Property

Having determined the James Street property was community property of Petitioner and husband Roy G. Thomas, with each spouse owning an undivided one-half thereof, consequences that attach to such property in the collection of federal taxes is a matter left to federal law. United States v. Rodgers, 461 US 677, 76 LEd 2d 236, 103 SCt 2132, 2137 (1983). United States v. Bess, 357 U.S. 51, 56-57, 78 SCt 1054, 1057-1058, 2 LEd 2d 1135, 1141 Hn 11-12 (1958).

The federal consequences are that a federal tax lien, levy, sale and conveyance on a piece of real property cannot extend beyond the property rights belonging to the person liable for the payment of tax [26 U.S.C. § 6321], and in an IRS summary administrative collection procedure [26 U.S.C. 6335) only the right, title and interest of the person liable for the tax is sold and conveyed. 26

U.S.C 6339(b)(2). United States v. Rodgers, 461 US 677, 76 LEd 2d 236, 103 SCt 2132, 2134 and 2135 (1983). Mansfield v. Excelsior Refinery Co., 135 US 326, 10 SCt 825, 34 LEd 162 (1890). United States v. Lester, 235 F.Supp. 115, 119 Hn 1-2 (DC NY 1964). Texas statutes and Texas common law doctrines are not part of the Internal Revenue Code unless they have been made such by Congress. United States v. Bess, supra at 1141 Hn 12.

Under Federal Law Who Is Liable For The Payment of Employment Taxes?

Ascertaining who is liable for the payment of a federal tax (i. e. who is the delinquent taxpayer?), is a matter of federal law. United States v.Rodgers, supra. Hollingshead v. United States, U.S. Dist Ct. N.D.Tex, Abilene Div. No. AC1-85-54-K, 7/1/85, CCH 85-2 USTC §9772. § 5.22, § 5.24 and § 5.61, Texas Family Code, are immaterial in determining who the delinquent taxpayer is because they

have not been made laws of the United States by Congress.

Under Federal law the person who is liable for the payment of employment taxes (withholding and social security) is the employer. 26 U.S.C. § 3403. Menick v. Hoffman, 205 F2d 365, 368 Hn 3 (CA9 1953). The general rule is that the "employer" is the person for whom an individual performs any service as the employee of such person [26 U.S.C. § 3401(d)]; Federal Tax Regulations, 1972, § 31.3401(d), U. S. Code Congressional & Administrative News, Volume 2, page 1280. The Federal Tax Regulations recognize that Congress has adopted the common-law definition of the relationship between employer and employee. Federal Tax Regulations, 1972, § 31.3401(c), U. S. Code Congressional & Administrative News, Volume 2, page 1279. Rabkin & Johnson, Federal Income, Gift and Estate Taxation, 1985, § 74.02A, p 7404.

The "person liable for any tax" as stated in § 6321 and in § 6331, is the same person referred to as the "party delinquent" in § 6339(b)(2), and both are referred to in the cases as the "delinquent taxpayer". See United States v. Rodgers, 461 US 677, 76 LEd 2d 236, 103 SCt 2132, 2141 and 2144 (1983).

All the evidence in this case is that Roy G. Thomas was the common-law employer, and that Petitioner was not the employer. Roy G. Thomas operated the dry cleaning business in Fort Worth, Texas, as a sole proprietorship (SF p 12, lines 8 - 14), under the name of Zip Cleaners" (SF p 19, lines 10-12). At one time he had as many as 13 cleaners, and branched out into the washateria business (SF p 17, lines 13 - 16). Zip Cleaners was operated by Roy G. Thomas (SF p 12, lines 11 - 14). It was his business (SF p 11, lines 3 - 5). Roy G. Thomas' wife, Ruth Thomas [Petitioner]

did not work in the cleaning business (SF p 12, lines 23 and 24). She was employed elsewhere as a registered nurse (SF p 11, lines 3 - 5; p 12, lines 23 - p 23, line 4). The delinquent taxes of Zip Cleaners were a debt owed by Roy G. Thomas (SF p 16, lines 27 - p 17, line 3). The taxes were withholding taxes and social security taxes which Roy G. Thomas dba Zip Cleaners withheld from his employees (SF p 17, lines 4 - 10; and p 18, lines 2 - 4), and which he had failed to remit to the Internal Revenue Service (SF p 17, lines 11 - 12). Roy G. Thomas had enough money to pay his employees their net salaries but not the taxes (SF p 18, p 14 - 15). The property was seized by IRS for non-payment of delinquent taxes due from Roy G. Thomas, Zip Cleaners. (SF p 16, lines 11 - 22; and Pl Ex #8, p 45 SF). Ruth Thomas did not personally have any contacts with the Internal Revenue Service (SF p 13,

lines 9 - 11). She learned from her husband, Roy G. Thomas, that the Internal Revenue Service had posted a Notice that they were intending to seize the property and that there would be a sale (SF p 13, lines 15 - 22). The Quitclaim Deed received by Respondent Joe D. Rhodes recites that Roy G. Thomas, dba Zip cleaners was indebted to the United States for taxes imposed by the Internal Revenue Code (Pl Ex #7, p 44 SF). Petitioner Ruth Thomas' name was not on the Notice Of Public Auction, nor was she mentioned in the quitclaim deed (SF p 16, lines 11 - 22; and Pl Ex #8, p 45 SF).

It is clear that as a matter of law Roy G. Thomas was the "employer" within the meaning of 26 USC § 3401(d), and that Petitioner was not the "employer."

The following testimony is no evidence that Ruth Thomas was the common-law employer: the profits from Zip Cleaners

were placed in Ruth Thomas' and Roy G. Thomas' joint checking account (SF p 12, lines 15 - 17). These profits were used for household expenses (SF p 12, lines 18 and 19). Ruth Thomas is sure she signed some checks on behalf of Zip Cleaners (SF p 12, lines 20 - 22). Ruth Thomas and Roy G. Thomas filed a joint income tax return, and income from the business was reported on Schedule "C" of Ruth Thomas' and Roy G. Thomas' personal income tax return (SF p 19, lines 13 - 19). When there was a profit from the business it was deposited in Roy G. Thomas' personal checking account used for personal living expenses (SF p 19, lines 20 - p 20, line 1).

Roy G. Thomas was the delinquent taxpayer. Petitioner was not the delinquent taxpayer. United States v. Rodgers, supra. United States v. Molina, 584 F.Supp. 1011 (SD Tex 1984). Hollingshead v. United States, U.S. Dist Ct. N.D.Tex,

Abilene Div. No. AC1-85-54-K, 7/1/85, CCH 85-2 USTC §9772.

What Property Rights in The James Street Property "Belonged To" Roy G. Thomas?

Ascertaining what property rights in the James Street property belonged to Roy G. Thomas is a matter of federal law. United States v. Rodgers, supra. Hollingshead v. United States, U.S. Dist Ct. N.D.-Tex, Abilene Div. No. AC1-85-54-K, 7/1/85, CCH 85-2 USTC §9772. § 5.22, § 5.24 and § 5.61, Texas Family Code, are immaterial in determining what property rights belonged to Roy G. Thomas because they have not been made laws of the United States by Congress.

Under federal law, the property rights that belonged to Roy G. Thomas were his true or actual property rights, not his apparent or legal title. Adler v. Nicholas, 166 F2d 674, 678 Hn 1-2 (CA 10 1948). United States v. Lester, 235 F. Supp 117, 119 Hn 3 (DC NY 1964). See

Maule Indus., Inc. v. Tomlinson, 244 F2d 897 (CA5 1957), where the Court said that where the IRS has levied upon property belonging to one person in order to satisfy the tax liability of another, the true owner may obtain from the United States District Court an injunction to prevent the sale of the property.

The true or actual property right of Roy G. Thomas in the James Street property was his undivided one-half community interest therein. Although the Deed to the James Street property was taken in Roy G. Thomas' name only, nevertheless his true and actual ownership was only his undivided one-half community interest therein, because his wife was the true or actual owner of an undivided one-half thereof. See United States v. Rodgers, supra, for an example where the Court recognized the Texas homestead interest as a true or actual interest in the property although

such homestead interest was not a matter of public record, but is a right created by the Texas Constitution, Statutes and case law, just as each spouse's ownership of an undivided one-half of the community property is created by the Texas Constitution, Statutes and case law of Texas. United States v. Molina, 584 F.Supp. 1011, 1013 (S.D. Tex 1984), calls the Texas homestead a "vested independent property right" [even though its existence is not of record].

Unless it otherwise provides, a statute establishing a lien on property belonging to a taxpayer is construed to intend to apply the common-law principle that property to which the lien attaches is the true or actual ownership of the taxpayer. 4 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 111.5.4, p. 111-102 (1981). Anderson, Federal Tax Liens--Their Nature and Priority, 41

Calif. L. Rev. 241, 250 (1953). Reid, Tax Liens, Their Operation and Effect, New York University Ninth Annual Institute on Federal Taxation 563, 568 (1951). Clark, Federal Tax Liens and their Enforcement, 33 Va. L. Rev. 13, 17 (1947).

The fact that the Internal Revenue Regulations forbid the IRS from making any warranty as to the validity of the title of any property sold by it, indicates that it is only the true ownership of the taxpayer to which the federal lien and levy attach, and which is sold and conveyed. See Code of Federal Regulations, 1972, § 301.6335 (c)(iii), p. 1695.

The common-law rule that the lien and levy attach to true or actual ownership, is illustrated by the Texas law on judgment liens. See Hammett v. McIntire, 365 S.W.2d 844 (Houston, 1962). reh den, er ref, nre).

A Community Debt Under Texas Law Is Immaterial As To Who was Liable For Employment Taxes Under Federal Law

Under a summary administrative levy and sale, it is immaterial that the federal tax debt under Texas law was a community debt, because it is federal law that determines the consequences of the attachment of the federal tax lien, not State law, and the Internal Revenue Code limits the consequences to the property belonging to the delinquent taxpayer without regard to Texas law on creditors rights generally. United States v. Rodgers, supra. Hollingshead v. United States, U.S. Dist Ct. N.D.Tex, Abilene Div. No. AC1-85-54-K, 7/1/85, CCH 85-2 USTC §9772. In Rodgers, the Court recognized that under Texas law, all of the tax liabilities in the Rodgers case were community debts, but the Court did not consider this as material to a determination of who was liable for the taxes under Federal law. In Hollingshead,

the federal tax debt was a community debt, but the Court did not consider this in reaching its decision. Congress has not made the provisions of §5.61, Texas Family Code, a part of the Internal Revenue Code governing the summary administrative levy and sale procedure. It is only when the United States elects to collect federal taxes by a § 7403 proceeding in Federal Court, that Congress, by the terms of § 7403, has made § 5.61 a law for the United States. See United States v. Rodgers, supra, at p. 2144. § 7403 provides that the Government can subject any property of whatever nature, of the delinquent taxpayer or in which he has any right, title or interest to the payment of his tax liability, and the district court shall determine the merits of all claims to and liens upon the property, and may decree a sale of such property and a proper distribution of the proceeds of such sale

according to the findings of the Court in respect to the interests of the parties and of the United States. The "interests of the parties" brings in the application of § 5.61 in a §7403 Federal Court procedure. United States v. Molina, 584 F.Supp. 1011 (S.D. Tex 1984).

State law regulating creditors' rights does not apply to the United States because the United States has not looked to State law to decide how to enforce federal tax liens. United States v. Overman, 424 F2d 1142, 1146 (CA9 1970).

The Taxes Were Not Jointly Owed by Petitioner and Husband

Federal law, not Texas law, determines whether or not the federal tax debt is an individual one, or a joint one. United States v. Rodgers, supra at 2152 Hn 12, illustrates the difference between the joint tax liability of husband and wife and the individual tax liability of a spouse under Federal law. Whether or not

Petitioner Ruth Thomas was jointly liable for the employment taxes under Texas law, is immaterial because Congress has not made Texas law on this issue a part of the Internal Revenue Code.

The IRS paper work (Notice and Quit-claim Deed, Pl Ex 8, p 45 SF, and Pl Ex 7, p 44 SF) did not include Petitioner's name. This shows the IRS considered the taxes were not jointly owed. If the IRS had been claiming Petitioner was jointly liable for the employment taxes, the Notice of Public Auction Sale would have recited the delinquent taxes were due from "Roy G. Thomas and wife Ruth Thomas, Zip Cleaners," it would have recited the title offered was only the right, title and interest of "Roy G. Thomas and wife Ruth Thomas, Zip Cleaners," and the IRS Quit-claim Deed would have recited it was conveying all the right title and interest of "Roy G. Thomas and wife Ruth Thomas, dba

Zip Cleaners."

Under Federal law Petitioner Ruth Thomas was not jointly liable for the employment taxes.

What Property Rights in James Street Property Were Sold and Conveyed by the IRS Quitclaim Deed?

In our case, the Internal Revenue Service elected to collect the delinquent employment taxes by the summary administrative procedure available to the Internal Revenue Service [26 U.S.C. §§ 6331, 6335, 6338(b) 6339(b) and 6342], Mansfield v. Excelsior Refinery Co., 135 US 326, 10 SCt 825, 34 LEd 162 (1890), not by a §7403 Federal Court proceeding [26 U.S.C. §7403] Under the administrative procedure, the sale and IRS conveyance was limited to the property and rights to property belonging to Roy G. Thomas. Mansfield v. Excelsior Refinery Co., 135 US 326, 10 SCt 825, 34 LEd 162 (1890); State by Commissioner of Transportation v. Shuman, 374 A2d 500

(New Jersey, 1977); United States v. Overman, 424 F2d 1142, 1146 - 1147 Hn 10-11 (CA9 1970); Carter v. United States, 399 F2d 340, 343 (CA5 1968). See United v. Rodgers, supra at p 2135.

Looking to the IRS' intentions in this matter, it is obvious that the Internal Revenue Service intended to sell and convey only the property rights in the James Street property belonging to Roy G. Thomas, and did not intend to sell and convey any of Petitioner's interest therein. The Notice of Public Auction on which the IRS Quitclaim Deed was based, had only Roy G. Thomas' name on it, and gave notice that only the right title and interest of Roy G. Thomas would be sold (Pl Ex 8, p 45 SF). The IRS' quitclaim deed to Respondent recites the conveyance of all the right, title and interest of Roy G. Thomas dba Zip Cleaners (Pl Ex 7, p 44 SF).

The absence of Petitioner's name on these two documents, and the wording in them, such as the use of "dba Zip Cleaners" after Roy G. Thomas' name, leads to the obvious conclusion that the Internal Revenue Service recognized that federal law made Roy G. Thomas (1) the sole employer, (2) the sole person liable for the tax, and (3) the sole delinquent taxpayer. The Court in Rodgers, supra at p 2140, recognized Donald Ingram as the employer, the person liable for the tax and the delinquent taxpayer, and his wife as the non-delinquent taxpayer. In Molina, supra, the husbands were recognized as the delinquent taxpayers.

All the evidence in our case is that Petitioner had no notice of assessment and demand of payment and no Notice of Public Auction. The testimony was that Petitioner did not personally have any contacts with the Internal Revenue Service (SF p

13, lines 9 - 11). She learned from her husband, Roy G. Thomas, that the Internal Revenue Service had posted a Notice that they were intending to seize the property and that there would be a sale (SF p 13, lines 15 - 22). Petitioner requested the Trial Judge to make a finding that Petitioner had no notice of the seizure and proposed public sale (Supp Tr. p 3, RFF #19). Without any notice to Petitioner, the IRS had no lien on, and no right to sell, any property rights actually belonging to Petitioner in the James Street property. 26 U.S.C. § 6303(a) and § 6321. § 6303(a) requires a notice and demand to each person liable for federal taxes. The failure of IRS to give such notice and demand to a person liable prevents a federal tax lien and levy from attaching to property belonging to such non-notified person, and prevents an administrative sale and conveyance thereof. 26 USC 6321.

F. P. Baugh, Inc. v. Little Lake Lumber Co., 297 F2d 692, 3 ALR 2d 625, certiorari denied 370 US 909, 82 SCt 1256, 3 LEd 2d 404.

The Court of Appeals (on page 10 of the Court's Opinion of January 22, 1986) held that one of the rights conveyed by the IRS quitclaim deed was the right to convey without Ruth Thomas joinder. The "right to sell without the joinder of the other spouse," is not property or a right to property under Texas law. This right to convey without joinder of the other spouse is a right given by the Statute, not by a conveyance. The right to convey without the joinder of the other spouse is a statutory marital rule which cannot be conveyed by one person to another, and was not conveyed by the IRS quitclaim deed.

Having determined (1) that Mr. Thomas was the sole person liable for the employee withholding and social security taxes,

(2) that his true and actual property right in the James Street property was only an undivided one-half thereof, and (3) that the federal tax lien and levy attached only to Roy G. Thomas' undivided one-half thereof, then federal law [28 USC § 6339(b)(2)] limited the sale and IRS quitclaim deed to Roy G. Thomas' undivided one-half of the James Street property leaving Petitioner's undivided one-half vested in her.

Although under Texas law community property may only be partitioned by complying with provisions of the Texas Constitution, Art 16, § 15, and §§ 5.42 and 5.44 of the Texas Family Code, an Internal Revenue Service summary administrative levy, sale and conveyance of a delinquent taxpayers' community undivided one-half interest in community property, overrides the indissolubility-of-community-property restriction. The result of the sale was a

federally-forced partition of the James Street property. Broday v. United States, 455 F2d 1097 (CA5 1972). Examples of a judicially-forced partition of a Texas community asset are Cooper v. Texas Gulf Industries, Inc., 513 SW2d 200 (Tex Sup Ct 1974), and Williams v. Portland State Bank. 514 SW2d 124 (Tex Civ App 1974, err dismd).

This federally-forced partition resulted in Petitioner and Respondent becoming equal tenants-in-common in the James Street property, Petitioner owning her half as her separate property. See Rodgers, supra at p 2136 where the Court calls the homestead, as defined by Texas law, a separate right, meaning that the proceeds received by the non-delinquent spouse from the Federal Court sale ordered in the Rodgers case would be the non-delinquent spouse's separate property.

Sheriff's Ad Valorem Tax Deeds Not Analagous to IRS Tax Lien, Levy and Sale

Sheriffs' deeds as a result of ad valorem tax lien foreclosures are not authority for what property rights were conveyed by the IRS quitclaim deed. Ad valorem tax liens, foreclosures and sales are controlled by Texas law, not Federal law. In Texas, the ad valorem tax lien is a special lien against a specific tract of land, and attaches to 100% of the property. Texas Constitution, Art. 8, § 15. Texas Property Tax Code, § 32.01. The order of sale in an ad valorem foreclosure suit orders the property sold. Texas Property Tax Code, § 33.53. Ad valorem tax foreclosure suits are essentially in rem proceedings, that is, the title that results from Sheriffs' ad valorem tax sales not only extinguishes the interests of the person liable to pay the tax, but also any other interest that had attached to the property, even if the owners of such interests could not otherwise be held

liable for the tax. In other words, the purchaser receives a completely new title, not just somebody's interest. See Rodgers, supra at 2143, and also the dissenting opinion at 2160, 2161.

In contrast, a federal tax lien, levy, sale and quitclaim deed as the result of an IRS administrative levy and sale is different. Federal tax liens are general in nature, naming a person, rather than a particular tract of land. Federal tax liens, levies and sales are controlled by Federal law, not Texas law. The federal tax lien is limited to the interest belonging to the delinquent taxpayer in any particular tract of land. Under the summary administrative procedure, the sale and IRS conveyance is limited to such interest. 26 U.S.C. § 6339(b)(2). Sales and conveyances of real property by the Internal Revenue Service administratively are not in rem proceedings. The rights of

the non-delinquent taxpayers and rights of persons not notified are not affected. Rodgers, supra at p 2144.

REASONS FOR GRANTING THE WRIT AS TO FEDERAL QUESTION #II

Petitioners' Failure to Redeem Not a Waiver of Her Rights

Respondent's defense that Petitioner is precluded from bringing this lawsuit because she failed to redeem the property from the IRS, is a federal question. 26 USC § 6337. This important question of federal law decided by the Texas Court of Appeals, has not been, but should be, settled by this Court. The result of the proper application of this statute to the facts of this case is that Petitioner is not estopped from bringing her trespass to try title action by the failure to redeem the property.

26 U.S.C. § 6337 says the person entitled to redeem shall be permitted to redeem. This means the Statute is a per-

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missive one, that is, it gives one the right to redeem but not the duty to redeem. Also, there is nothing in the language of § 6337 which prescribes any kind of penalty or loss of rights for failure to do so.

Actually § 6337 is not applicable at all to Petitioner's assertion of a claim to her undivided one-half of the James Street Property because the redemption statute applies only to the real property sold. 26 USC. § 6337. The real property sold in this case was not her undivided one-half, but was Roy G. Thomas' undivided one-half of the James Street Property. Since the statute does not apply to her one-half, she cannot be held to have waived her right to recover her undivided one-half of the James Street Property. State by Commissioner of Transportation v. Shuman, 374 A2d 500 (New Jersey, 1977).

INDEPENDENT STATE GROUND UNFOUNDED

It is clear that the only State ground upon which the Texas Court of Appeals based its decision against Petitioner, is that the 5 year statute of limitations, § 16.025, Texas Civil Practices & Remedies Code (formerly Art. 5509, Vernons Annotated Civil Statutes), bars her recovery. It is also clear that such decision is wholly unfounded. The Texas law is crystal clear that Joe. D. Rhodes had to prove the ad valorem taxes were paid each year before they became delinquent in order to sustain such limitations defense. Baker v. Fogle, 217 SW 141 (Tex Sup Ct 1919); Keels v. Keels, 427 SW2d 913 (Tex Civ App 1968); Gramm v. Coffield, 116 SW2d 1089 (Tex Civ App 1983, err dismd). In its Opinion, the Texas Court of Appeals admits this is the law of Texas and cites the Keels case, and further admits there is no testimony that

the taxes were paid before they became delinquent (See Appendix A, on pages A 16 and A 17 of this Petition). The Texas Court of Appeals trys to justify its holding by stating:

> "We hold the evidence is sufficient to support the trial court's finding that Rhodes has paid all the taxes on the property which by implication is a finding they were paid before becoming delinquent."

However Texas law is clearly otherwise. Rule 299, Texas Rules of Civil Procedure, states as follows:

> "Where findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumption of finding upon any ground of recovery or defense, no element of which has been found by the trial court; but where one or more elements thereof have been found by the trial court, omitted unrequested elements, where supported by evidence, will be supplied by presumption in support of the judgment. . ."

The Trial Court found the taxes were paid (p. 40, Tr), but did not find they were

paid before they became delinquent. Such failure to find they were paid before they became delinquent, is an omitted unrequested element of Respondent's defense. All Texas cases recognize that for an appellate court to impliedly find an omitted unrequested element in support of the trial court judgment where there is a statement of facts before the appellate court, such statement of facts must contain evidence in support of such omitted unrequested element. Some of the Texas cases recognizing this are: Ott v. Bell, 606 SW2d 955, 957 (Tex Civ App 1980); Ervin v. Ervin, 624 SW2d 264, 266 (Tex Civ App, error dismd, 1981). Nacol v. Metallic Development Corp, 614 SW2d 172, 174 (Ft. Worth Tex Civ App 1980, err dismd). The Texas Court of Appeals apparently completely ignored Petitioner's claims under federal question #I and her arguments under Respondent's federal

question #I defense, and then clearly ignored Texas law in order to hold for Respondent on an independent State ground. The Court of Appeals should have reversed and rendered this case in favor of Petitioner because it is clear that (1) Federal law is controlling on the facts of this case, not State law, (2) under such Federal law the IRS sale and conveyance did not convey Petitioner's undivided one-half community interest in the James Street Property to Respondent. (3) the federal redemption statute (26 USC §6337) does not estop Petitioner from pursuing her trespass to try title action, and (4) under Texas law, Respondent failed to prove his defense of limitation.

Where the only State ground appears to be unfounded, this Court has jurisdiction to grant the Writ and determine both the merits of the State ground and of the federal questions. Johnson v. Risk, 127

US 300, 34 L Ed 683, 11 S Ct 111 (1890).

Respectfully Submitted

ROBERT E. HOBLIT
Counsel of Record

P. O. Drawer 4109
Odessa, Texas 79760
Phone: 915 337 3535

Lester C. Boone
Will Hadden of
Hadden & Hadden,
Attorneys, P.C.
414 N. Lee Street
Odessa, Texas 79761

Counsel for Petitioner

PROOF OF SERVICE--CERTIFICATE BY BAR MEMBER

I, ROBERT E. HOBLIT, counsel of record, and one of the attorneys for Ruth Thomas, Petitioner herein, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of December, 1986, I served three copies of the foregoing Petition for Writ of Certiorari on Respondent by depositing same in a United States Post Office, with first class postage prepaid, addressed to Respondent's Counsel of record at his post office address, as follows, to-wit:

MR. JOE K. GORDON
Attorney and Counselor at Law
P. O. Box 13951
Arlington, Texas 76094-0951

I further certified that all parties required to be served have been served.

ROBERT E. HOBLIT
Counsel of Record
P. O. Drawer 4109
Odessa, Texas 79760
Phone: 915-337-3535

APPENDIX A

IN THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

NO. 2-85-133-CV

RUTH THOMAS Appellant	§ §	From The 342nd District Court
	§	Tarrant County
vs.	§	January 22, 1986
	§	
JOE D. RHODES Appellee	§ §	Opinion by Justice Ashworth

OPINION

This appeal is from a take nothing judgment in a trespass to try title case. The primary question presented is whether a quitclaim deed executed by the Internal Revenue Service conveying the right, title and interest of the husband in non-homestead community divests the wife of her interest when the property is held only in the name of the husband and the property is sold to satisfy taxes jointly owed. We hold such deed does divest the wife of her interest.

Judgment affirmed.

In 1959 Roy G. Thomas and wife, Ruth Thomas, appellant, acquired the property subject to this suit. Title to the property was taken in the name of Roy G. Thomas. In 1972 the property was sold at public auction for nonpayment of delinquent Internal Revenue taxes. Appellee, Joe D. Rhodes, was the purchaser at the auction. In 1973, after the redemption period of 120 days expired, the District Director of Internal Revenue executed a quitclaim deed to appellee which states in part:

> [D]o hereby grant, sell, convey and quitclaim to the said Joe D. Rhodes, his heirs and assigns all the right, title and interest of the said Roy Thomas, dba Zip Cleaners, in and to the following described real estate . . .

Rhodes filed his deed and took possession of the property, exercising all the rights and assuming all the obligations incident to ownership. His ownership was not questioned until a letter was

received from appellant's attorney shortly before suit was filed in 1982. Appellant contends the quitclaim deed did not divest her of her one-half interest in the property.

After a nonjury trial the trial court filed findings of fact and conclusions of law. in two conclusions of law, the trial court held the sale by the Internal Revenue Service divested appellant of her interest in the property. Appellant's first eight points of error, variously stated, are directed toward these two conclusions, alleging no evidence and insufficient evidence to support such holdings. Insufficiency of the evidence and no evidence points of error are properly addressed to findings of facts; points of error addressed to conclusions of law are contentions that the trial court has erred in applyaing the law to the facts. In any event, the thrust of appellant's appeal is

that the quitclaim deed did not divest her of her interest in the property and this is the issue we address.

TEX. FAM. CODE ANN. sec. 5.24 (in effect in 1973) (Vernon 1975) provides in part:

> (a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in his or her possession and is not subject to such evidence of ownership.
>
> (b) A third person dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property if:
>
> > (1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and
> >
> > (2) the person dealing with the spouse:
> >
> > > (A) is not a party to a fraud upon the other spouse or another person; and
> > >
> > > (B) does not have actual or constructive notice of

the spouse's lack of authority.

In the instant case there is no question that the property was taken in the name of Roy D. Thomas only, therefore it is presumed to be subject to his sole management, control, and disposition. Bpth the Internal Revenue Service and appellee were entitled to rely on the ability of Roy D. Thomas to deal with the property without the joinder of appellant. Roy D. Thomas would have had the authority to convey the property without appellant's joinder. See Cummings v. Johnson, 616 F2d 1069, 1074-75 (9th Cir. 1979). There is no contention that the Internal Revenue Service or appellee is a party to a fraud upon appellant. Appellant does contend that the fact that Roy D. Thomas and appellant jointly executed a deed of trust for money borrowed for improvements subjects the property to their joint management and control. In support of her

contention, appellant cites Cockerham V, Cockerham, 527 s.W.2d 162 (Tex. 1974)1; Cooper v. Texas Gulf Industries, Inc., 513 S.W.2d 200 (Tex 1974); and Williams v. Portland State Bank, 514 S.W.2d 124 (Tex. Civ.App.--Beaummont 1974, writ dism'd) The cases cited fail to support appellant's contention even though each is authority for the issues each addresses. No good purpose would be served by summarizing the cases cited. We reject appellant's contention that the joint execution of the deed of trust or its predecessor mechanic's lien contract had the effect of rendering the property in question subject to the joint management and control of Roy D. Thomas and appellant; neither did the execution of the deed of trust and mehcanic's lien contract destroy the presumption that such property was subject to the sole management, control, and disposition by

Roy D. Thomas. Appellant's first eight points of error are overruled.

Appellant's points of error nine through fourteen, again variously stated, complain of the findings that appellant and Roy D. Thomas owned and operated Zip Cleaners and were responsible for its debts. Conversely, appellant contends Roy D. Thomas was the delinquent taxpayer. At the time of oral argument, this court posed the question to both parties as to whether there was any question about the taxes in issue being a community debt. Assurance was given that there was no such question. However, we will briefly address the contentions asserted in appellant's brief.

The business, Zip Cleaners, was situated on the property in question. Such property was unimproved when purchased and a building was constructed, financed at least in part from loan

proceeds from the mechanic's lien contract, later renewed in the deed of trust. The business was operated as a sole proprietorship under the name of Roy D. Thomas. Thomas failed to pay payroll taxes leading to the levy on the propertyby the Internal Revenue Service. The operations of the business had been reported on joint income tax returns filed by appellant and Roy D. Thomas. Income from the business was deposited in a joint checking account subject to checks signed by appellant. Appellant testified she was sure she had signed checks on behalf of Zip Cleaners. There was sufficient evidenct to warrant the trial cout's finding that the taxes in issue were a community indebtedness. Appellant's points of error nine through fourteen are overruled.

Points of error fifteen through eighteen assert error in the finding that

the property was subject to the sole management, control and disposition of Roy D. Thomas, because there is no evidence, and insufficient evidence to support such finding. Conversely, appellant contends there was error in failing to find the property was subject to joint management because there is no evidence, and insufficient evidence to support the failure to make such findings.

We have previously addressed these points of error earlier in this opinion, and such points are overruled.

Points of error nineteen and twenty complain the trial court erred in failing to find Rhodes had constructive notice that the property was subject to joint management because there is no evidence, and insufficient evidence to support the failure to make such findings. We interpret these points of error as contending that as a matter of law, Rhodes

had constructive notice that the property was subject to joint management. We have previously held the property was subject to the sole management of Roy D. Thomas. Points of error nineteen and twenty are overruled.

Points of error twenty-one through twenty-six again complain of trial court error in failing to make certain findings. In effect, appellant contends as a matter of law Rhodes had actual and constructive notice that Roy D. Thomas was the delinquent taxpayer; that appellant was not the delinquent taxpayer; and that Rhodes had constructive notice he was not purchasing appellant's undivided one-half interest. These points of error are overruled because they have previously been addressed in our discussion of other points of error.

Points of error twenty-seven and twenty-eight contend error in the finding

that during the period of Rhodes' possession, appellant worked at a building immediately adjacent to the property, and was aware of Rhodes' possession and action. These points of error contend there was no evidence and insufficent evidence to support such findings.

The testimony concerning appellant's knowledge of Rhodes' possession came from Rhodes and is stated here:

> Q. Mr. Rhodes, approximately when did you take possession of this property?
>
> A. The sale was September 1st, 1972, and I simply took possession at that time. I received the Deed dated 120 days later in that order.
> Q. At that time did any person make any claim as to any ownership of that property ?
>
> A. No.
>
> Q. After you took possession of the property did you have occasion to ever visit with the Plaintiff, Ruth Thomas?
>
> A. Yes.
>
> Q. Where would these visits have taken place?

A. The Plaintiff's husband operates a funeral home adjacent to the property in question, and I have visited with them there, I have gone across to the funeral home maybe come over to the building and we visited outside.

Q. On or about the premises?

A. Right.

Q. Did Mrs. Thomas ever make any claim to you of owernship of part of this property?

A. No claim was ever made before this case was filed in 1982 or whatever, she never made an oral statement to me concerning ownership.

Q. Did any person make a statement to you concerning ownership by Mrs. Thomas or any third party for part of this property?

A. No.

Q. So when did you first become aware there was a dispute, potential dispute of the ownership?

A. When I was notified that this case had been filed?

We hold this testimony is sufficient to support the findings complained of and points of error twenty-seven and twenty-eight are overruled.

Points of error twenty-nine and thirty are "failure to find points" asserting in effect that as a matter of law Rhodes did not repudiate appellant's ownership of a one-half interest. The testimony shows that Rhodes took possession of the property, rented it, made payments on the first lien, insured it, collected on an insurance claim, and paid the taxes on the property. During this time, appellant worked at an adjacent building. We hold there was no failure by Rhodes to repudiate appellant's interest. Points of error thirty-one and thirty-two contend error in the finding that Rhodes' possession was adverse to appellant, arguing noevidence and insufficent evidence to support such finding. The discussion and holdings under points twenty-seven through thirty are dispositive of points thirty-one and thirty-two: they are overruled.

Points of error thirty-three through thirty-eight complain of the findings which support the conclusion that appellant's cause of action for title is barred by TEX. REV. CIV. STAT. ANN. art. 5509 (Vernon 1958). Two of the points in this cluster contend no evidence and insufficient evidence to support the finding (in reality the conclusion) that appellant's cause of action is barred; two points contend no evidence and insufficient evidence that Rhodes was claiming under a duly registered deed; and two points contend no evidence and insufficient evidence that Rhodes had paid all the taxes on the property.

Article 5509 provides in pertinent part that a suit to recover real estate against a person having peaceable and adverse possession, cultivating, using or enjoying the property, and paying the taxes thereon, and claiming under a deed

or deeds duly registered, shall be instituted within five years from the accrual of the cause of action.

Appellant contends the quitclaim deed executed by the Internal Revenue Service does not qualify as a deed under art. 5509, and that only the one-half interest of Roy D. Thomas was conveyed. We reject this contention. We have previously held that Roy D. Thomas had the right to convey the property without the joinder of the appellant. The internal Revenue Service had the right to, and did, convey all of the right, title, and interest of Roy D. Thomas; one of his rights conveyed by the Internal Revenue Service was his right to convey without appellant's joinder. Under the circumstances of this case, where the property is non-homestead, and title is taken only in the name of one spouse, thereby creating a presumption that the grantee has the right of sole management,

the quitclaim deed had the effect or conveying the interest of the other spouse. Our situation is similar to a quitclaim deed executed by a sheriff following a tax lien foreclosure -- such deed has been held to convey the interest of the true owner of the property. See Porter v. Wilson, 389 W.W.2d 650, 657 (Tex. 1965). Points of error thirty-three through thirty-six are overruled.

Points of error thirty-seven and thirty-eight allege no evidence and insufficient evidence to support the finding that Rhodes paid the taxes before they became delinquent. It is true, as alleged by appellant, that in order to acquire title under art. 5509 the taxes on the property must be paid before they become delinquent. See Keels v. Keels, 427 S.W.2d 913, 917 (Tex.Civ.App.--Tyler 1968, no writ). In the instant case, Rhodes testified that tax deposits were

included in the monthly payments made to the loan company until the loan was paid in full, and thereafter he paid the taxes himself. It is true that there is no testimony that the taxes were paid before they became delinquent. It is also true that there is no testimony that any of the taxes became delinquent. Appellant did not avail himself of his right to cross-examine Rhodes about the timeliness of the tax payment. We hold the evidence is sufficient to support the trial court's finding that Rhodes has paid all the taxes on the property which by implication is a finding they were paid before becoming delinquent. Points of error thirty-seven and thirty-eight are overruled.

Points of error thirty-nine and forty contend no evidence and insufficient evidence to support the finding that appellant waived her right to recover the property by her failure to follow the

statutory redemption procedures of 26 U.S.C. sec. 6337 (1967). Appellant argues that the interest of appellant was never conveyed, therefore the redemption statute does not apply. We have previously held that appellant's interest was conveyed under the quitclaim deed in question. Points of error thirty-nine and forty are overruled.

Point of error forty-one contends error in failing to order a partition since as a matter of law appellant and Rhodes are co-tenants. Number forty-two contends error in failing to render a money judgment in favor of appellant for her share of stipulated net rents. Number forty-three contends error in failing to fix a lien on Rhodes' one-half interest to secure payment of her share of net rents.

In addressing appellant's previous points of error, we have in effect, and

now do overrule her last three points of error.

Judgment affirmed.

/s/ Clyde R. Ashworth

Justice

Panel B

Fender, C.J.; Ashworth and Hill, JJ.

Publish

Jan 22 1986

APPENDIX B

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 11, 1986

Mr. Lester C. Boone
1927 Hemphill Street
Fort Worth TX 76110

Mr. Will Hadden
Hadden & Hadden
414 N. Lee Street
Odessa, TX 79761

Mr. Joe K. Gordon
P. O. Box 13951
Arlington TX 76094

RE: Case No. C-5177

STYLE: RUTH THOMAS
v. JOE D. RHODES

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours

Mary M. Wakefield,
Clerk

By/s/ Blanca E. Morin
Deputy

APPENDIX C

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

Mr. Lester C. Boone
1927 Hemphill Street
Fort Worth TX 76110

Mr. Will Hadden
Hadden & Hadden
414 N. Lee Street
Odessa, TX 79761

Mr. Joe K. Gordon
P. O. Box 13951
Arlington TX 76094

RE: Motion for Rehearing of Application for Writ of Error

STYLE: Cause No. C-5177
RUTH THOMAS
v. JOE D. RHODES

September 10, 1986

The Motion for Rehearing of Application for Writ of Error in the above styled case was this day overruled.

Respectfully yours

Mary M. Wakefield,
Clerk

By/s/ Blanca E. Morin
Deputy